Public Prosecutor v Lee Beng Siang

HIGH COURT (MUAR) — CRIMINAL CASE NO 47–2 OF 1989
RICHARD TALALLA J
25 JULY 1991

Criminal Law *— Dangerous drugs — Trafficking — Presumption — Quantity of drugs — Analysis of weight of drugs — Proper procedure to be adopted — Dangerous Drugs Act 1952 ss 37(da)(i), (j) & 39B*

Criminal Procedure *— Amendment of charge — Court amending charge before close of prosecution case — Saving of judicial time — Criminal Procedure Code (FMS Cap 6) ss 154, 158, 180, 279 & 280*

Evidence *— Expert evidence — Chemist's evidence — Presumption of trafficking — Analysis of weight of drugs seized — Grounds or reasoning of opinion may be properly inquired into*

The accused was charged with trafficking in 23.02g of heroin under s 39B of the Dangerous Drugs Act 1952 ('the Act'). The prosecution relied entirely on the presumption of trafficking in s 37(da)(i) of the Act given the weight of the drugs as analysed. The government chemist was therefore called as the first witness. He gave evidence that he received two packages containing 20 sealed packets and 10 sealed packets respectively of pinkish granular substance on 9 May 1988 from the police. The chemist weighed the packets of pinkish granular substance in two lots with their seals intact. He then put the entire contents of each lot in a blender to thoroughly blend the same. After blending, a sampling process known as quartering and coning was applied and he came to the conclusion that the two packages seized contained a total of 23.02g of heroin. He returned the packages to the police on 4 July 1988. As the prosecution was not calling any further evidence on the issue of trafficking, at the conclusion of the chemist's evidence, the court invited submissions on whether the prosecution were able to prove the offence of trafficking.

Held, convicting the accused on the amended charge of possession:

(1) The testimony of the chemist had to be scrutinized so as to ascertain whether the prescribed weight of the heroin had been proved beyond a reasonable doubt.

(2) The chemist did not ensure that the substance was devoid of air and moisture before weighing it, and did not take into consideration the weight of the air and moisture in his reckoning of the net weight of the substance. He thus could not testify as to their weight.

(3) The chemist had not adopted the procedure set out in s 37(j) of the Act. He lumped the contents of all the packets in one lot and mixed the lot. This was prejudicial to the accused because the greater the amount to be mixed, the greater the effort needed to

A do so and the greater the risk was of the mixture not being uniform. The procedure adopted was unsatisfactory.

(4) The chemist claimed to have mixed the substance in accordance with accepted procedure. He did not, however, say who prescribed the practice and how it came about and by whom it was accepted. Merely stating that the substance was mixed thoroughly was insufficient.

(5) The chemist said that he removed from the mixed substance a representative sample which he worked on to arrive at what he considered to be the percentage of heroin contained in that sample. He did not weigh the sample and therefore was unable to give evidence of the quantity of the sample he took in which heroin was detected. There was thus no basis on which the chemist could conclude the weights of the heroin in the packages. There should have been evidence as to why the chemist considered the unspecified amount he took by way of sample was sufficient for his purpose whereupon it would have been for the court to decide whether the amount was adequate.

(6) Taking the representative sample the chemist testified to carrying out three named tests. He did not describe the tests, in particular any quantitative test. His evidence in this respect was unsatisfactory.

(7) There was no evidence before the court of the description of the instrument the chemist used to weigh the substance, how it worked or of it being in proper working order and duly serviced.

(8) According to the chemist the exhibits were handed to him on 9 May 1988 and he completed his analysis on 13 June 1988. There was no evidence as to who had possession, custody or control of the exhibits in the interim. The courts require evidence of regular and proper custody of exhibits in cases of this nature. The lack of evidence in this regard was unsatisfactory.

(9) In all case in which opinion evidence was receivable, whether from experts or not, the grounds or reasoning upon which such opinion was based may properly be inquired into. On the facts of this case there were serious gaps in the chemist's evidence and the court was not satisfied that the chemist had properly analysed the substance produced to him.

(10) For the court to hear the prosecution's case to its conclusion and then make a finding pursuant to s 180 of the Criminal Procedure Code (FMS Cap 6)('the Code') would have been an exercise in futility. Section 158 of the Code is clear in its terms and empowered the court to alter the charge at any time before judgment is pronounced. The court thus exercised that power and altered the charge to one of possession.

[Bahasa Malaysia summary

Si tertuduh telah dituduh menyeludup 23.02g heroin di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta itu'). Pihak pendakwa bergantung

sepenuhnya ke atas anggapan menyeludup di dalam s 37(da)(i) Akta itu, memandangkan berat dadah seperti yang dianalisa. Pegawai kimia kerajaan lantaran itu dipanggil sebagai saksi pertama. Beliau memberi keterangan bahawa beliau telah menerima dua bungkusan yang masing-masing mengandungi 20 bungkus kecil yang kedap dan 10 bungkus kecil yang kedap yang berisi bahan butiran berwarna merah muda pada 9 Mei 1988 daripada pihak polis. Pegawai kimia itu menimbang bungkus kecil yang mengandungi bahan butiran berwarna merah muda dalam dua kumpulan dengan pengedapnya tidak dipecahkan. Beliau kemudiannya meletakkan keseluruhan kandungan setiap kumpulan ke dalam satu mesin pengisar supaya ia diadun dengan sempurna. Selepas pengadunan satu proses 'sampling' yang diketahui sebagai 'quartering and coning' telah dijalankan dan beliau berkesimpulan behawa kedua-dua bungkusan yang ditahan itu mengandungi heroin berjumlah 23.02g. Beliau kemudiannya memulangkan bungkusan itu kepada polis kepada 4 Julai 1988. Oleh kerana pihak pendakwa tidak memanggil apa-apa keterangan lanjut tentang isu penyeludupan, di akhir keterangan pegawai kimia itu, mahkamah telah mempelawa hujah-hujah sama ada pihak pendakwa berjaya membuktikan kesalahan penyeludupan.

Diputuskan, mensabitkan si tertuduh atas tuduhan pindaan pemilikan:

(1) Testimoni pegawai kimia harus diperinci untuk memastikan sama ada berat heroin yang diperuntukkan itu telah dibuktikan melampui keraguan yang munasabah.

(2) Pegawai kimia tidak memastikan bahawa bahan itu tidak mengandungi udara dan kelembapan sebelum menimbangnya, dan tidak mengambil ingat tentang berat udara dan kelembapan dalam membuat kesimpulannya tentang berat bersih bahan itu. Oleh itu beliau tidak dapat membuat testimoni tentang berat bahan itu.

(3) Pegawai kimia tidak menggunakan prosedur yang dibentangkan di dalam s 37(j) Akta itu. Beliau telah meletakkan kandungan semua bungkusan itu ke dalam satu kumpulan dan mencampur-adukkan kumpulan-kumpulan itu. Ini membawa kesan mudarat kepada si tertuduh kerana semakin banyak amaun yang harus digaulkan, semakin banyak pula usaha yang diperlukan untuk berbuat demikian dan semakin besar risiko campuran itu tidak seragam. Prosedur yang digunakan itu tidaklah sempurna.

(4) Pegawai kimia mendakwa yang ia telah menggaulkan bahan itu mengikut prosedur yang diterima. Beliau, namun demikian, tidak mengatakan siapakah yang telah menggariskan prosedur itu dan bagaimana prosedur itu diwujudkan dan siapakah yang telah menerimanya. Cuma dengan mengatakan yang bahan itu telah digaulkan dengan rapi tidaklah mencukupi.

(5) Pegawai kimia mengatakan bahawa beliau telah mengambil satu contoh perwakilan daripada bahan yang digaulkan dengan mana beliau menjalankan ujian untuk mendapatkan apa yang disifat-

kannya peratusan heroin yang terkandung di dalam contoh itu. Beliau tidak menimbang contoh itu dan dengan itu tidak dapat memberi keterangan tentang banyaknya contoh yang telah diambilnya dalam mana heroin telah dikesan. Oleh itu tidak ada asas yang membolehkan pegawai kimia itu membuat kesimpulan tentang berat heroin di dalam bungkusan itu. Sememangnya patut ada keterangan mengapa pegawai kimia itu memikirkan bahawa amaun tidak tentu yang diambilnya sebagai contoh adalah mencukupi untuk tujuannya, dan mengikut keterangan itu mahkamah akan memutuskan sama ada amaun itu mencukupi.

(6) Dengan mengambil contoh perwakilan itu pegawai kimia itu telah membuat testimoni bahawa beliau menjalankan tiga ujian yang dinamakan. Beliau tidak menggariskan ujian itu, terutama sekali sebarang ujian kuantitatif. Keterangannya dari segi ini adalah tidak sempurna.

(7) Tidak ada keterangan di depan mahkamah tentang gambaran alat yang digunakan oleh pegawai kimia untuk menimbang bahan itu, bagaimana ia berjalan atau tentang alat itu berada dalam keadaan sempurna dan telah diservis.

(8) Mengikut pegawai kimia itu ekshibit itu telah dihantar kepadanya pada 9 Mei 1988 dan beliau telah menyelesaikan analisanya pada 13 Jun 1988. Tidak ada keterangan tentang siapa yang mempunyai pemilikan, penjagaan atau penguasaan ke atas ekshibit itu dalam jangka waktu itu. Mahkamah memerlukan keterangan penjagaan yang teratur dan sempurna ke atas ekshibit dalam kes sebegini. Kekurangan keterangan dalam aspek ini adalah tidak sempurna.

(9) Dalam semua kes di mana keterangan pendapat diterima, sama ada daripada seorang pakar atau tidak, asas atau alasan atas mana pendapat sebegitu didirikan boleh diselidik. Atas fakta kes ini, terdapat kekosongan yang serius di dalam keterangan pegawai kimia itu dan mahkamah tidak berpuas hati bahawa pegawai kimia itu telah menganalisakan dengan sempurna bahan yang diserahkan kepadanya.

(10) Untuk mahkamah mendengar kes pihak pendakwa hingga ke akhirnya dan selepas itu membuat satu keputusan menigkut s 180 Kanun Acara Jenayah (FMS Bab 6) ('Kanun itu') akan menjadi satu usaha yang sia-sia sahaja. Seksyen 158 Kanun itu adalah jelas dalam termanya dan ia memberi kuasa kepada mahkamah untuk meminda tuduhan pada sebarang masa sebelum keputusan diumumkan. Oleh itu, mahkamah telah menjalankan kuasa itu dan meminda tuduhan kepada tuduhan pemilikan.]

[*Editorial Note*: The public prosecutor has appealed to the Supreme Court vide Criminal Appeal No 05–94–91.]

Cases referred to

1 *PP v Ang Soon Huat* [1991] 1 MLJ 1 (folld)
2 *PP v Chew Yoo Choi* [1990] 2 MLJ 444 (refd)
3 *Au Ah Lin v PP* [1963] MLJ 365(refd)
4 *PP v Wahab bin Abdullah* [1991] 1 MLJ 217 (folld)
5 *Abdullah bin Yaacob v PP* [1991] 2 MLJ 237 (folld)
6 *Munusamy v PP* [1987] 1 MLJ 492 (distd)
7 *Pacific Tin Consolidated Corporation v Hoon Wee Thim* [1967] 2 MLJ 35 (refd)
8 *Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor and another appeal* [1990] 1 MLJ 171 (refd)
9 *The Reverend Thomas Pelham Dale's Case* (1881) 6 QBD 376 (refd)
10 *Re Tan Boon Liat @ Allen & Anor et al* [1977] 2 MLJ 108 (refd)
11 *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other appeals* [1990] 2 MLJ 297 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 154, 158, 180, 279, 280
Dangerous Drugs Act 1952 ss 37, 39B
Federal Constitution art 5

Haji Idris bin Haji Othman (Deputy Public Prosecutor) for the public prosecutor.

WP Leong (*WP Leong & Partners*) for the accused.

Cur Adv Vult

Richard Talalla J: In this case the accused stands charged as follows:

> Bahawa kamu, Lee Beng Siang K/P No S0048242J (Singapura) pada 3 Mei 1988, jam lebih kurang 6.15 pagi, di Simpang Jalan Seroja/Jalan Kemuning, Batu Satu, Jalan Tanjong Laboh, Batu Pahat, dalam daerah Batu Pahat, Negeri Johor bagi pihak kamu sendiri, telah didapati mengedar dadah berbahaya iaitu 23.02g heroin, dan dengan itu, kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

This prosecution called as its first witness one Mr Qua Sai Chuan, a senior chemist attached to the Department of Chemistry, Johore Bahru. Mr Qua testified that on 9 May 1988 he received from one Insp Sahat, inter alia, two packages, one of which contained 20 sealed plastic packets each containing a light pinkish granular substance and the other containing ten sealed plastic packets each containing a like substance.

Mr Qua weighed the 20 packets with their respective seals intact. He then removed their contents and weighed the empty packets. He ascertained the difference in weight between the packets in their gross state and the empty packets and that difference he deduced to be the net weight of the contents. The net weight he so found was 75.2g.

A He then put the contents in a blender and testified to thoroughly blending the same until it became a fine powder. After the blending, a sampling process known as coning and quartering was applied to the powder. A total of four coning and quartering processes were carried out on this powdered sample until a working sample which is the representative sample was derived for analysis. The chemist went on to testify very briefly that there B were three different methods that were employed in this analysis, the methods being (i) colour test, (ii) thin layer chromatography and (iii) gas liquid chromatography. The chemist added that these were established methods. Having analysed the contents so he came to the conclusion that the 75.2g of substance contained 15.4g of heroin.

C Mr Qua adopted the same procedure and system of analysis in respect of the contents of the other ten plastic packets and found their net weight to be 37.64g which contents on analysis he concluded contained 7.62g of heroin.

The chemist did not testify to the quantity of the representative sample he took for each of the two analyses but said in his opinion the sample taken D was more than enough for the analyses.

The chemist issued a written report of his analysis and findings. The relevant part of the report is as follows:

> I examined the envelopes submitted and found:
>
> E In envelope 'B' — a plastic bag marked 'A' and an envelope marked 'AA'.
>
> (i) I found in plastic bag 'A' another envelope also marked 'A', containing twenty (20) plastic packets marked 'A1' to 'A20' respectively.
>
> The above plastic packets each contained some light pinkish granular substance, having a total net weight of 75.42g.
>
> On analysis, I found the above light pinkish substance to contain 15.40g F of heroin.
>
> The light pinkish granular substance had all been powdered and a representative sample was collected for analysis before it was packed in a separate plastic bag labelled 'A' and with the above laboratory number.
>
> (ii) I found envelope 'AA' to contain ten (10) plastic packets marked 'AA1' to 'AA10' respectively, each filled with some light pinkish granular substance, G having a total net weight of 37.64g.
>
> On analysis, I found the above light pinkish substance to contain 7.62g of heroin.
>
> The light pinkish granular substance had all been powdered and a representative sample was collected for analysis before it was packed in a separate plastic bag labelled 'AA' and with above laboratory number.
>
> H Heroin is listed in the First Schedule of the Dangerous Drugs Act 1952.

In cross-examination Mr Qua admitted in regard to the three methods he adopted that the colour test and the thin layer chromatography test were qualitative tests, meaning that they were tests to determine the type of drug as opposed to its quantity.

I The cross-examination continued. He was asked whether if the same exhibits had been analysed by another chemist in the same department as his the weight result might be slightly different to which he agreed that the weight would be more or less.

The chemist went on in cross-examination to testify that the general procedure in his department was to register exhibits in the general office but in this particular case, it was a major case in the sense that it was a drug trafficking case, the investigating officer came straight to see and handed over the exhibits to him. This happened on 9 May 1988. The chemist testified to having completed both his analyses on 13 June 1988 and to returning all exhibits to Insp Sahat on 4 July 1988. There is no evidence as to where all these exhibits were in the interim, that is to say between 9 May, the day they were received from the police, and 4 July, when they were returned to the police.

When Mr Qua weighed the packets for their gross weight they were sealed. He confessed to each packet containing a certain amount of air and that air does have weight, that possibly in the sealed packets there would have been moisture and that moisture carries weight. He then confirmed that he did not directly weigh the contents of the packets but ascertained the same by subtraction. He also confirmed that he did not know the percentage or weight of heroin in each and every packet.

In re-examination the chemist testified that no doubt there was moisture in the plastic packets but the weight of the air was negligible. He added that in fact it would not be detected by his analytical balance which could weigh up to the fourth decimal place and that the same applied to moisture.

Mr Qua proceeded in re-examination to say the weight of heroin from the combined contents of the 20 packets would be the same as the weight of the heroin obtained by individual analysis if that individual analysis had been carried out on each of the packets. Finally in re-examination he testified that he carried out a statistical analysis of errors and found the percentage error to be 1.037% from the 20 packets and 1.093% from the contents of the 10 packets.

On completion of the testimony of the chemist, he being as I said the first prosecution witness, I asked the learned deputy, despite the provisions of ss 279 and 280 of the Criminal Procedure Code (FMS Cap 6) ('the Code') which were in my mind at the time, whether he would be leading further evidence on the issue of trafficking. His answer was in the negative and that the prosecution would be relying on the evidence of the chemist and the statutory presumption under s 37(da)(i) of the Dangerous Drugs Act 1952 ('the Act') to prove trafficking. That being the case it seemed to me that the court should hear submissions at that stage on the said issue and thereafter if the court found that the prosecution had established, on the evidence of the chemist, a case for the presumption under s 37(da)(i) to arise, the trial should go on as charged. If the court found otherwise than it would have to follow that there was no case of trafficking, and in that event the court should give consideration to forthwith altering the charge under s 158 of the Code. Such a course, to my mind, had the effect of obviating the necessity of a long and expensive trial. Having expressed this view in the course of the trial to both counsel to which there was no objection, I heard submissions from both counsel.

Defence counsel in the first place questioned the method of weighing adopted by the chemist, saying that the weight of the air and moisture in the sealed packets was not deducted. Secondly, counsel argued that the chem-

ist had admitted to there being a margin of error and that no allowance was made for the same. Thirdly, it was argued on behalf of the accused that all the contents of the substance were lumped together and that thus the chemist had followed his own procedure instead of the procedure deducible from the presumption provided for in s 37(j) of the Act which reads as follows:

> when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than 10 per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the sample so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug.

The fourth point made on behalf of the accused was that there was no evidence of the accuracy of the weighing machine.

In this instance a main, if not the paramount, ingredient of the said offence is trafficking. At this stage the only question before the court is whether the accused did traffic in the drugs concerned and to prove that he did so the prosecution is relying solely on the presumption ('the presumption') provided for in s 37(da)(i) of the Act which presumption reads as follows:

> any person who is found in possession of 15 grammes or more in weight of heroin otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

It will be seen at once that one essential prerequisite to the presumption arising in favour of the prosecution is that the weight of heroin, the subject matter of the charge, is proved beyond reasonable doubt to be 15g or more. The learned deputy having assured me that he was adducing no further evidence on the issue of trafficking and that he was relying solely on the evidence of the chemist to establish the same via the presumption it had to follow that the testimony of the chemist had to be scrutinized so as to ascertain whether the prescribed weight of the heroin has been proved beyond reasonable doubt. In regard to the chemist's evidence I make the following observations and findings.

Firstly, he did not ensure that the substance was devoid of air and moisture before weighing it. Instead he weighed the sealed packets, 20 of them in the course of one analysis and 10 of them in the second analysis, and did not take into consideration the weight of the air and moisture in his reckoning of the net weight of the substance. In fact he did not testify to the amount of air and moisture in the packets and it had to follow that he could not testify to their weight. It is true that the chemist said that the weight of the water and moisture involved was negligible. That was a categorical statement unsupported by explanation. He did not speak of the weight of water. He did not say what the moisture was, whether it was a combination

of air and water or other liquid, nor what the general weight of the moisture was.

Secondly, the chemist spoke of mixing the substance in a blender. He claimed to have done this as part of his analysis which he said was carried out in accordance with accepted practice. However, he did not say who (what authority or body of persons) prescribed such practice or how it came about and by whom it was accepted. In this regard I have in mind the judgment of Chan Sek Keong J in *PP v Ang Soon Huat.*[1] It is granted that the chemist testified that he mixed the substance thoroughly. To my mind that was insufficient. Rather he had to say not only what he did but also what ordinarily would be the effect of what he did, in this instance the extent and the final result of the mixing and the authority for the procedure adopted. With all this evidence in hand it was then for the court to find whether in fact the substance was thoroughly mixed.

Thirdly, the chemist did not adopt the procedure set out in presumption (j). Had he done so, and all other considerations being satisfactory, his evidence would have been acceptable. Instead the chemist adopted his own procedure. He lumped the contents of all 20 packets in one lot and mixed the lot. This to my mind was prejudicial to the accused because the greater the amount to be mixed, the greater the effort that is needed to do so and the greater the risk is of the mixture not being uniform. Granted this proposition and seeing that the chemist did not avail himself of the procedure set out in presumption (j), to my mind he should have weighed the substance in each packet separately, taken a sample from each, weighed each sample, ascertained the percentage of heroin in each sample, related each percentage to the net weight of each respective sample to arrive at the weight of heroin in each packet and then added the weight in all the packets, thus arriving at the total weight of heroin found in all the packets. I find the procedure he adopted to be unsatisfactory.

Fourthly, the chemist said that he removed from the mixed substance a representative sample which he worked on to arrive at what he considered to be the percentage of heroin contained in that sample. However, he did not weigh and therefore was unable to give evidence of the quantity of the sample he took. He did say, however, that the sample was more than enough for his purpose but again did not offer any basis for saying so. In a case involving facts somewhat similar to this one, the case of *PP v Chew Yoo Choi*,[2] Faiza Tamby Chik JC finding that the chemist's tests and analyses could not be safely relied upon, said at p 447 that surely, as far as quantitative test is concerned, by using just 1g out of a total of 71.97g to find out the weight of the heroin present in the so-called pinkish substance is certainly not conclusive. It was submitted by the learned deputy that there is no statutory requirement for the chemist to have taken a specific quantity from the whole as a sample and by way of support the deputy referred to the presumption in s 37(j) of the Act and the case of *Au Ah Lin v PP*[3] where Thompson LP said at p 366 in relation to a similar presumption in s 61 of the Excise Act 1961:

> In our view s 61 does not require that samples be taken of the contents of every package or container which is in question. The samples shall be 10% of the packages or containers and when that is done the presumption mentioned in the

A section as to the contents of all the packages arises. In our view the section does not require the taking of any particular quantity. That is abundantly clear on the reading of the section itself. The words 'ten per centum' refer to the packages, not to the contents of each package.

With respect, I agree but that to my mind does not detract from what Faiza Tamby Chik JC said as stated above. There was simply no evidence of the quantity of the sample. It could have been less than 1g. It could have been an iota. As I see it there should have been evidence as to why the chemist considered the unspecified amount he took by way of sample was sufficient for his purpose whereupon it would have been for the court to decide whether the amount was adequate.

Fifthly, taking the representative sample the chemist testified to carrying out three named tests. Apart from that he did not describe these tests, in particular any quantitative test, nor did he explain how the particular test worked to the end that it would produce a certain result. So all the court has before it by way of evidence on this aspect is that the chemist conducted three tests. With due respect I find his evidence in this regard unsatisfactory.

Sixthly, given that there was no evidence of the weight of the sample in which heroin was detected and so no percentage of the heroin so detected, it had to follow that there was no basis upon which the chemist could by mathematical deduction related to the weight of the substance arrive at his conclusion that the two lots of substance contained 15.4g and 7.62g of heroin respectively.

Seventhly, the chemist having testified to there being a margin of error, there is no evidence of his having taken this into account in arriving at his computation of the weight of the heroin. This, coupled with his admission that if the analysis had been carried out by another chemist in the department the weight of the heroin would be more or less, in my view gave rise to further doubt.

Eighthly, there was no evidence before the court of the description of the instrument the chemist used to weigh the substance, how it worked or of it being in proper working order and duly serviced.

Ninthly, the exhibits according to the chemist were handed to him by Insp Sahat on 9 May 1988 and he completed his analyses on 13 June 1988. There was no evidence as to who had possession, custody or control of the exhibits in the interim. Obviously the chemist could not have had the exhibits in his personal possession all the time. He would have gone home after work each day. What did he do with the exhibits then? Did he keep them secured under lock and key when not working on them? Or did he leave them in the laboratory for all and sundry to have access to and possibly tamper or meddle with them? I do not know. What I do know is that the courts require evidence of regular and proper custody of exhibits in cases of this nature. See the judgments of the Supreme Court in *PP v Wahab bin Abdullah*[4] and *Abdullah bin Yaacob v PP.*[5] I find the evidence or rather the lack of it in this regard to be unsatisfactory.

The prosecution called in aid the Supreme Court decision in *Munusamy v PP.*[6] Naturally I am bound by that decision. However, that case seems to be distinguishable on the facts. There the only reason for sending the

exhibits to the chemist was to determine their identity; not so here. There the charge was one of trafficking in cannabis weighing 649.5g whereas this is a case of trafficking in 23.02g of heroin. Here the margin in weight is a mere 8.02g, a slender margin on which the life of the accused might well hang, if the sombre pun may be excused. Thus in the particular circumstances of this case the fate of the accused would be as much if not more in the hands of the unchallenged chemist as it is in the court to determine. That to my mind should not be allowed. In *Pacific Tin Consolidated Corporation v Hoon Wee Thim*,[7] a civil case, it was argued that in dealing with matters of science, the views of the judge himself, as a layman, should yield to those of the expert; and that no alternative view differing from that of the expert could be tenable without cogent evidence in its support. To that argument Ong Hock Thye FJ at p 37 ruled that in all cases in which opinion evidence is receivable, whether from experts or not, the grounds or reasoning upon which such opinion is based may properly be inquired into. This is a capital charge in the criminal jurisdiction. It lies in the prosecution to prove beyond reasonable doubt to the satisfaction of the trial judge that the substance produced to the chemist for analysis was properly analysed by him and properly found by him to contain 15g or more of heroin. To the end of so satisfying the judge the prosecution should have led conclusive evidence from the chemist as to how he arrived at his opinion of the weight of the heroin. On the facts of this case there are serious gaps in his evidence and I am not so satisfied.

It has been said by Hashim Yeop A Sani CJ in the Supreme Court in regard to cases of habeas corpus where the liberty of the individual is involved that the law of preventive detention must be construed strictly and in case of doubt the court should lean in favour of the subject, and further a detention not in accordance with law is inconsistent with the fundamental right guaranteed by art 5(1) of the Constitution. See the case of *Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor and another appeal*[8] at p 172. See also the dictum of Brett LJ in *The Reverend Thomas Pelham Dale's case*[9] which dictum has found favour by the Federal Court in *Re Tan Boon Liat @ Allen & Anor et al*[10] at p 110. The dictum is as follows:

> Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue.

Furthermore in the case of *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other appeals*[11] at p 299 once again our Chief Justice abovenamed said:

> We are fully conscious of the government's effort to combat the drug menace in this country. But there is a fundamental principle involved here. The power to detain a person without trial cannot be exercised by inference. The power must be expressed, clear and unequivocal. Where detention law and the liberty of the individuals are concerned, this is the most correct approach for the courts to apply. There is hardly any need to repeat what has been said on the principle to be followed by the courts in dealing with detention law. The principle was

A emphasized in *Re Tan Boon Liat @ Allen & Anor* [1977] 2 MLJ 108 at p 114 reiterated by this court in *PP v Koh Yoke Koon* [1988] 2 MLJ 301 and *Tan Hoon Seng v Minister of Home Affairs* [1991] 1 MLJ 171.

Such are the strict curial demands in cases involving personal liberty; a fortiori in trials such as this where not only is the liberty of the subject at risk B but the accused also stands vulnerable to mandatory sentence of death in the event of conviction of the offence charged. Thus it seems to me that this court should be concerned to ensure that not only are the same strict considerations as pertain to habeas corpus cases to be applied here but also that each and every ingredient making up the offence charged is strictly proved, proved beyond reasonable doubt, the more so when the prosecu- C tion is relying on a statutory presumption to prove the capital charge.

Upon a consideration of the chemist's evidence as a whole and the many unsatisfactory aspects therein as stated above and having posed the hypothetical question in both the forms recommended in *Munusamy v PP*[6] referred to above I find that the prosecution has failed to prove that the D accused was trafficking in heroin as charged but I do find that there is evidence that he was in possession thereof. Accordingly pursuant to s 154 of the Code I should alter the charge to one of possession punishable under s 39A of the Act.

I should add that notwithstanding the learned deputy's assurance that he would not be leading further evidence of trafficking, in his submission in E answer to that of the defence he referred to s 180 of the Code which provided that when the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence. F By that reference I took him to imply that despite the said assurance I should hear the case for the prosecution to its conclusion, then make a finding pursuant to the terms of that section and at that stage, if thought fit, to alter the charge. To my mind taking such a course would have been an exercise in futility. Section 158 of the Code to my mind is clear in its terms. It empowers the court to alter the charge at any time before judgment is G pronounced. Such being the case I exercise that power. The charge is altered thus:

> Bahawa kamu pada 3 Mei 1988 jam lebih kurang 6.15 pagi, di Simpang Jalan Seroja/Jalan Kemuning, Batu Satu, Jalan Tanjong Laboh, Batu Pahat dalam daerah Batu Pahat, Negeri Johor telah didapati memiliki dadah heroin jumlah H berat 5g lebih, kurang dari 15g yang demikian itu telah menyalahi s 12(2) dan boleh dihukum di bawah s 12(3) dibaca bersama s 39A(2)(a) Akta Dadah Berbahaya 1952.

The accused pleaded guilty to the amended charge, was convicted and sentenced to 12 years' imprisonment with effect from the date of his arrest and the mandatory ten strokes of the rotan. I

Accused convicted on amended charge.

Reported by Mathavan Devadas